AFFIN BANK BHD v. ABU BAKAR ISMAIL

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: W-03(IM)-18-02-2016]
6 MARCH 2017

BANKRUPTCY: *Adjudication and receiving orders – Annulment of – Judgment debtors made two applications to set aside and annul adjudication and receiving order – First application unsuccessful but second application successful – Whether order rightly made – Whether attracted res judicata – Bankruptcy Act 1967, s. 105*

CIVIL PROCEDURE: *Res judicata – Adjudication and receiving orders – Judgment debtors made two applications to set aside and annul adjudication and receiving order – First application unsuccessful but second application successful – Whether order rightly made – Whether attracted res judicata*

The judgment creditor ('the appellant'), appealed against the decision of the High Court Judge ('the HCJ') who affirmed the decision of the Deputy Registrar who allowed the application by the judgment debtor ('the respondent'), to set aside and annul the adjudication and receiving order ('the AORO') pursuant to s. 105 of the Bankruptcy Act 1967 ('the Act'). The appellant had obtained judgment against the respondent in 2004. The respondent's first application to annul the AORO was made on grounds that there was in existence a Singapore Court of Appeal ('the SCA') order that the respondent was solvent. The first application was dismissed by the Senior Assistant Registrar ('the SAR') and on appeal, the HCJ ordered for the annulment. However, on appeal to the Court of Appeal, the decision of the SAR was reinstated. The second application for annulment was on similar grounds. The appellant objected against the second application on similar grounds. However the HCJ not only took into consideration the SCA decision but also the fact that for more than four years, the Director General of Insolvency ('DGI') was not able to assess the damages awarded by the SCA. The strongest objection by the appellant was anchored on the issue of *res judicata*.

Held (dismissing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court):

(1) The AORO was rightly made at the material time as there was no evidence of the respondent's solvency and/or ability to pay. When the SCA decision was delivered 33 days from the AORO, the respondent had a right to apply under s. 105 of the Act as there was sufficient evidence to show that he was solvent. The first application under s. 105 of the Act was not successful. However, in the second application, one of the main considerations was the admission by the DGI not being able

A to assess damages. This additional fact which transpired over a period of time would not attract *res judicata*. Therefore, the HCJ rightly exercised the discretion given in s. 105 of the Act. (paras 5, 14 & 15)

***Bahasa Malaysia** Headnotes*

B Pemiutang penghakiman ('perayu') merayu terhadap keputusan Hakim Mahkamah Tinggi ('HMT') yang mengesahkan keputusan Timbalan Pendaftar yang membenarkan permohonan pemiutang penghakiman ('responden') untuk mengetepikan dan membatalkan perintah adjudikasi dan penerimaan ('AORO') bawah s. 105 Akta Kebankrapan 1967 ('Akta'). C Perayu memperoleh penghakiman terhadap responden pada 2004. Permohonan pertama responden untuk membatalkan AORO dibuat atas alasan terdapat perintah Mahkamah Rayuan Singapura ('MRS') bahawa responden solven. Permohonan pertama ditolak oleh Penolong Kanan Pendaftar ('PKP') dan susulan rayuan, HMT memerintahkan pembatalan. Walau bagaimanapun, atas rayuan di Mahkamah Rayuan, keputusan PKP D dihidupkan semula. Permohonan pembatalan yang kedua dibuat atas alasan serupa. Perayu membantah permohonan kedua atas alasan serupa. Walau bagaimanapun, HMT bukan sahaja mempertimbangkan keputusan MRS tetapi juga fakta bahawa selama lebih empat tahun, Ketua Pengarah Insolvensi ('KPI') tidak dapat mentaksir ganti rugi yang diawardkan oleh E MRS. Bantahan keras perayu dibuat berlandaskan isu *res judicata*.

Diputuskan (menolak rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

F **(1)** AORO dibuat dengan betul pada masa material dan tiada keterangan tentang kesolvenan dan/atau kemampuan responden untuk membayar. Apabila keputusan MRS dikeluarkan 33 hari selepas AORO, responden mempunyai hak memohon bawah s. 105 Akta kerana tidak cukup keterangan untuk menunjukkan bahawa dia solven. Permohonan pertama bawah s. 105 Akta tidak berjaya. Walau bagaimanapun, dalam G permohonan kedua, salah satu pertimbangan utama adalah pengakuan oleh KPI bahawa beliau tidak dapat mentaksir ganti rugi. Fakta tambahan yang berlaku dalam tempoh masa ini tidak membangkitkan *res judicata*. Oleh itu, HMT betul dalam menjalankan budi bicara beliau yang diperuntukkan bawah s. 105.

H **Case(s) referred to:**

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bungsar Hills Holdings Sdn Bhd v. Dr. Amir Farid Datuk Isahak [2005] 2 CLJ 809 FC ***(refd)***

I *East Asiatic Co Ltd v. Malaysian International Merchant Bankers Bhd [1981] 1 LNS 71 FC* ***(refd)***

ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***

Re Noble [1964] 2 All ER 522 ***(refd)***

Re Siow Ah Moi; Ex P United Orient Leasing Company Bhd [2007] 8 CLJ 104 HC ***(refd)***
Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta Malaysia [1995] 2 CLJ 368 SC ***(refd)***
Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 HC ***(refd)***
V Gopal, Re: Ex P; Bank Buruh (M) Bhd [1987] 1 CLJ 602; [1987] CLJ (Rep) 602 HC ***(refd)***

Legislation referred to:
Banruptcy Act 1967, ss. 6(3), 105

Other source(s) referred to:
GK Ganesan, *Bankruptcy Law in Malaysia and Singapore,* p 837

For the appellant - Manpal Singh Sachdev & Kiranjit Kaur; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners
For the respondent - Cantius Leo Camoens; M/s G Leo Camoens

[Editor's note: Appeal from High Court, Kuala Lumpur; Bankruptcy No: D-29-876-2010 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/judgment creditor's (JC) appeal is essentially in respect of the decision of the learned High Court Judge who had affirmed the decision of the Deputy Registrar who allowed the respondent/judgment debtor's (JD) application (encl. 67) to set aside and annul the adjudication and receiving order (AORO) pursuant to s. 105 of the Bankruptcy Act 1967 (BA 1967).

[2] The memorandum of appeal reads as follows:

> 1. The Learned Judge has erred in law and in fact in failing to adhere to the trite legal principle of *res judicata* in deciding that the Respondent/Judgment Debtor ought not to have been adjudged a bankrupt pursuant to Section 105(1) of the Bankruptcy Act despite the fact that the Respondent/Judgment Debtor's instant annulment application is premised on the same and/or similar grounds as the Respondent/Judgment Debtor's first application to annul the Adjudicating Order and Receiving Order which was dismissed by the Court of Appeal on the 17-09-2014.
>
> 2. The Learned Judge has erred in law and in fact in deciding that the Respondent/Judgment Debtor could be considered to be solvent as at the date of the Adjudicating Order and Receiving Order which is on 17/01/2013 based on a Singapore Court of Appeal Order which was pronounced only on the 20/02/2013.

A

3. The Learned Judge has erred in law and in fact in allowing the Respondent/Judgment Debtor's application for annulment of the Adjudicating Order and Receiving Order by failing to consider that the Respondent/Judgment Debtor had not at any point in time prior to or on the date of the Adjudicating Order and Receiving Order was recorded raised the contention that the Respondent/
B Judgment Debtor was solvent despite the fact that the Respondent/Judgment Debtor had full knowledge of the bankruptcy proceedings initiated against him and the Respondent/Judgment Debtor had challenged the bankruptcy proceedings at various stages through the Respondent/Judgment Debtor's solicitors.

C

4. The Learned Judge has erred in law and in fact in allowing the Adjudicating Order and Receiving Order to be set aside and annulled despite the fact that there was no appeal lodged against the Adjudicating Order and Receiving Order on the grounds that the Respondent/Judgment Debtor was solvent as at the date of the Adjudicating Order and Receiving Order.

D

5. The Learned Judge has erred in law and in fact in deciding that there was sufficient evidence presented to the Court in the Respondent/Judgment Debtor's second application for the annulment of the Adjudicating Order and Receiving Order to show that the Respondent/Judgment Debtor could have recovered the
E judgment sum from Chenet Finance Limited.

6. The Learned Judge has erred in law and in fact in deciding that by virtue of the Singapore Court of Appeal Order dated 20/02/2013 and the Singapore High Court Final Judgment dated 13/04/2015, the Respondent/Judgment Debtor ought to be considered a person who is solvent and able to pay his debts as at the date of the
F Adjudicating Order and Receiving Order on the 17/01/2013.

7. The Learned Judge has erred in law and in fact in failing to consider that pursuant to the terms of the Singapore Court of Appeal Order, Chenet Finance Limited would only be required to pay the judgment sum after the 20/02/2013 and therefore the Judgment
G Debtor could not by any stretch of the imagination be considered to be solvent and able to pay his debts as at the 17/01/2013 when the Adjudication and Receiving Orders were pronounced by the Court.

8. The Learned Judge has erred in law and in fact under all
H circumstances in exercising discretion to allow the Adjudicating and Receiving Order to be set aside and annulled by deciding that the Respondent/Judgment Debtor was solvent and able to pay his debts as at the date the Adjudication and Receiving Orders were pronounced by the Court on 17/01/2013.

I

9. The Learned Judge has erred in law and in fact in allowing the Adjudication and Receiving Order to be set aside and annulled in order to allow the Respondent/Judgment Debtor to enforce the

Singapore Court of Appeal Order dated 20/02/2013 and the Singapore High Court Final Judgment dated 13/04/2015 despite the fact that the administration of the estate of the Respondent/ Judgment Debtor ought to be carried out by the Director General of Insolvency subsequent to the Adjudication and Receiving Order having been pronounced by the Court on 17/01/2013.

10. The Learned Judge has erred in law and in fact in failing to consider that it would be detrimental to commercial morality to allow the setting aside and annulment of the Adjudication and Receiving Orders despite the fact that the Respondent/Judgment Debtor has not been able to show that the Respondent/Judgment Debtor has the means and was able to pay his debts.

11. The Learned Judge has erred in law and in fact in allowing the Respondent/Judgment Debtor's application to set aside and annul the Adjudication and Receiving Order in circumstances where the Appellant/Judgment Creditor would be gravely prejudiced by virtue of the inability of the Appellant/Judgment Creditor and the absence of other means to secure the repayment of the judgment debt which is based on a Judgment dated 08/07/2004.

[3] The facts of the case as articulated by learned counsel for the appellant appears to be complicated, but the facts and the related law is quite straightforward. It is important to note that the appeal is in respect of the discretionary power of the High Court exercised by the Deputy Registrar as well as the judge of the High Court pursuant to s. 105 of the BA 1967 which reads as follows:

Power of court to annul adjudication in certain cases

105(1) **Where in the opinion of the court a debtor ought not to have been adjudged bankrupt,** or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication [emphasis added].

(2) Where an adjudication is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts thereto for done by the Director General of Insolvency, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in at least one local paper.

A (4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court.

B (5) When the court annuls an adjudication under this section it shall also rescind the receiving order.

[4] The strongest objection by learned counsel for the appellant was anchored on the issue of *res judicata*. It is not in dispute in this case that:

C (i) the JD's first application to annul was not successful;

(ii) the first application was made on 16 December 2013. That application was dismissed by the Senior Assistant Registrar and on appeal to the judge the annulment was ordered. However, on further appeal to the Court of Appeal, the decision of the Senior Assistant Registrar was D reinstated. There were no written grounds of the decision by the Court of Appeal.

(iii) The first application was made on the grounds that there was in existence a Singapore Court of Appeal order dated 20 February 2013 which would demonstrate that the JD was solvent as early as the year E 2009;

(iv) The second application for annulment was on similar grounds.

[5] In consequence, learned counsel for the appellant objects on similar grounds. However, the learned High Court Judge not only took into F consideration the Singapore Court of Appeal decision but also the fact that for more than four years, the Director General of Insolvency (DGI) was not able to assess the damages awarded by the Singapore Court. On this additional fact which transpired over a period of time in our view will not attract '*res judicata*'. Further, at the time of AORO was granted, the court was G only concerned whether the respondent had committed an act of bankruptcy and assets, etc. which the respondent might want to offer to avoid the order being made. It all depends on the facts and circumstances of the case and the decision and guidelines by the courts. For example, s. 6(3) of the BA 1967, which relates to creditor's petition, says:

H (3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

I In *Bungsar Hills Holdings Sdn Bhd v. Dr. Amir Farid Datuk Isahak* [2005] 2 CLJ 809, the Federal Court held:

[1] The words "where in the opinion of the court a debtor ought not to have been adjudged bankrupt" in s. 105(1) of the Act does not cover only technical defects like defective service of the BN or CP but is wider and covers other "legal grounds" like an abuse of the process of the court. However, it should not be stretched too far to cover extraneous "moral" or "equitable" grounds. It has to be a legal ground as the court is only concerned with the law. In his application, the respondent was able to pay his debt. That might not be strictly a technical ground. However, it was a legal ground that fell within the ambit of the discretion under the said provision. It is also one of the grounds provided by s. 6 of the Act as a factor the court should consider in deciding whether or not to make a receiving order.

[2] The material date for consideration whether the RO and AO ought or ought not to have been made is the date of adjudication. This is because in the first limb of s. 105(1) of the Act the words "ought not to have been adjudged bankrupt" denotes the past tense. On the other hand, in the second limb of the said provision the words "the debts of the bankrupt are paid in full", denotes the present tense. Similarly, in the third limb of the said provision the present tense "are pending" is used. This clearly indicates that the material date for consideration in the case of the first limb is a date in the past that logically should be the date of adjudication.

[6] In an application for s. 105 of the BA 1967, the court has wider discretion to consider whether the annulments ought to be made.

Jurisprudence Relating To AORO And Annulment

[7] It is well established that a court will make an AORO order if it is satisfied that the debtor has committed an act of bankruptcy and the judgment creditor has complied with the procedural requirements satisfactorily. It is a statutory jurisdiction and also one within the court's discretionary power. However, if the debtor can satisfy the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors, then the adjudication order may not be made. In *Re Siow Ah Moi; Ex P United Orient Leasing Company Bhd* [2007] 8 CLJ 104, it was asserted:

(1) It is wrong for creditors to think that they have a substantive right given by law to make a person bankrupt or continue to keep them bankrupt until their natural death. It was never the intention of parliament to give absolute right to creditors to make a person a bankrupt. The discretion to make a person a bankrupt is entrusted to the courts and the court can exercise the discretion not to make a person bankrupt according to the justice of the case (s. 4 of BA 1967). (para 21)

(2) The court is vested with the jurisdiction to discharge the bankrupt. In ordinary circumstances, the court will make a person bankrupt if the condition stated in s. 5 of the BA 1967 is satisfied. It must be asserted that for all general principles and rules there are always exceptions. It may

A be recognized exceptions pursuant to case laws or possible exceptions to be confirmed by case laws. This is an area where there appears to be a slow progress or no progress by jurist and judgments of courts within the bankruptcy regime to ensure deserving cases are not made a bankrupt to ensure civil liberties guaranteed under the federal constitution are preserved according to the justice of the case. Because the court has a
B discretion the court may refuse to make a person bankrupt in cases where a person is spending his last days in death bed or such similar situations or for other good reasons which may include practical and feasible considerations which will benefit all parties.

[8] The BA 1967 allows the judgment debtor to annul and discharge the
C AORO pursuant to s. 105. Generally, an order for annulment is made where in the opinion of the court the debtor ought not to have been adjudged a bankrupt or where it is proved that the debts have been paid in full or where a court approves composition or scheme. In *Re Noble* [1964] 2 All ER 522, it was stated that where it can be shown that the adjudication was improperly
D obtained, the court must annul.

[9] If the court opines that the debtor ought not to have made a bankrupt that will be sufficient to invoke the provision of the discretion under s. 105. That discretion will not be readily interfered by the appellate court. Learned Author G.K. Ganesan in his Millennium Edition titled "*Bankruptcy Law in*
E *Malaysia and Singapore*" at p. 837 makes the following observation:

> In *Re Peter Wong: Ex parte The Debtor* (1959) 25 MU 27, a Singapore Court of Appeal case, Ambrose J (at p 30) said:
>
> > The proper approach in dealing with an application for annulment of an adjudication is that adopted by the Court of Appeal in *Re*
> F *Dunn* (1949) 1 Ch. 640; (1949) 2 All ER 388. In that case Evershed, MR, said (at p 390) that the power given to the Court by section 29(1) of the Bankruptcy Act 1914, is discretionary. That section corresponds to section 104(1) of the Bankruptcy Ordinance and provides as follows:
>
> > > G Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order annul the adjudication. [Section 29(1) of the Bankruptcy Act 1914 and s. 104(1) of the Bankruptcy
> > > H Ordinance are in *pari materia* with our Section 105(1) of the Bankruptcy Act 1967].
>
> He considered that the word 'may' gives the Court a discretion. In his view, before the Court will exercise its discretion in favour of the applicant, the applicant must satisfy the Court that the circumstances of
> I the case are such that the Court must annul the bankruptcy. This is clearly indicated by the following words of the learned Master of the Rolls:

> I think the official receiver (the applicant) must go so far as to say that the Court, in the circumstances of this case, must annul the bankruptcy.

[10] Section 105 order, like AORO order, is discretionary in nature with a lesser threshold in contrast to AORO. The court will be quick to make an AORO order if an act of bankruptcy is committed and if the debtor is not able to pay the debt. However, when it comes to an annulment order, the court at that stage would have sufficient information through the DGI of the debtor's estate for the court to exercise its discretion under s. 105, in an informed manner as opposed to the time of the making of the AORO order. This distinction must be kept in mind.

[11] It is well established that an appellate court will not intervene in the exercise of the discretionary power of the court below unless it can be shown that the court had exercised its discretion on wrong principles or has failed to take into consideration relevant matters before it or has taken into consideration, consideration not before it. Support for the proposition is found in a number of cases. In *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35, the Court of Appeal asserted:

> (b) It is well settled that in an appeal against the exercise of discretion by a judge, the initial function of the appellate court is one of review only, there being no original discretion vested in the appellate court. It is for the appellant to demonstrate that an error in the exercise of discretion has indeed occurred and it is also one of the categories of cases where appellate interference is warranted (see *Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858; *Majlis Peguam Malaysia & Ors v. Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155).

Brief Facts

[12] The facts and the law had been well articulated by the learned judge. We do not wish to repeat the salient facts and the law save where necessary. This judgment must be read together with the judgment of the High Court to appreciate our reasoning in the proper perspective.

[13] In the instant case, the JC had obtained judgment against the JD on 8 July 2004. Bankruptcy notice (BN) was issued only on 12 March 2010 but within the six years period. But the BN was served six years and four months from the date of the judgment. The JD before us take a preliminary point stating that BN at the time of service was bad in law as leave to issue the BN out of the six years period was not obtained as at the date of service. This issue was not raised in the High Court. We will deal with this issue at the end of the judgment. The JD managed to get an AORO order against the JC on 17 January 2013.

[14] The JD made the second application dated 18 June 2015 under s. 105. The main grounds were based on the fact that he had secured a judgment in his favour in the Singapore Court of Appeal on 20 February 2013. The judgment sum if realised will be more than sufficient to settle his liability. In consequence, he is not insolvent. In addition, it was also admitted by the DGI that they are not in a position to assess damages in the Singapore Court. It was also not in dispute that the Singapore judgment if realised will cover the JD's liability. *Inter alia*, based on these considerations the learned High Court Judge had exercised her discretion to affirm the decision of the Deputy Registrar. The relevant parts of the judgment are reproduced below:

> 18. How then did the learned DR exercised her discretion in determining whether a debtor [the JD] ought not to have been adjudged bankrupt' in the context of the present case? I find the learned DR took into cognisance the following matters in DR's 5 Grounds of Decision:
>
> [28] The parties had gone through a lengthy process which is inclusive of setting aside the BN and setting aside the CP.
>
> [29] However, it was undisputed that no ground was put forth by the JD with regards the Singapore Court of Appeal Judgment and the Supreme Court Assessment Order in both setting aside applications. The reason was simply because the two decisions were only obtained after the date of ROAO. Meaning that, they were not in existence at the date of adjudication order.
>
> [30] However, the circumstances show that the interest of the JD in the asset belongs to Chenet Finance was in existence since 2009. Although the Singapore Court of Appeal Judgment and the Singapore Supreme Court Assessment Order were made after the date of adjudication, the effect of the both decision was, in fact, the recognition of the JD's interest in the Chenet Finance's Asset since 2009 which amounting to RM28,790,766.02 as at 17.1.2013 (the date of ROAO) and RM33,551,721.76 as at 13.4.2015 (the date of the Assessment Order).
>
> [31] In my mind, the material fact to consider was not the date of the said Judgment and Order but the effect of the two. Meaning that, the JD has interest in Chenet Finance's asset since 2009 i.e. before and at the time the ROAO were made, in view of the said Singapore decisions.
>
> [32] Chenet Finance is not an individual. It is a finance company located in Singapore. Thus, it is difficult for me to imagine how the JC's debts could not be satisfied if the JD is freed to execute the said Assessment Order. Furthermore, the Judgment and the Order remain unexecuted as at to date. It was the JD alone, all this while, who had taken necessary legal actions against the Chenet Finance. Hence, I could not see how the commercial morality would be affected in such situation if a debtor had struggled himself to get his monies back to pay off his debtor(s).

[33] I agree with learned counsel for the JD that there was no issue of *res judicata*.

[34] Accordingly to learned counsel for the JC, the issues raised by the JD in the First Annulment Application and this present application in enclosure 67 are the same. Upon appeal, the same issues were deliberately heard and decided by the Court of Appeal.

[35] In resisting the argument, it was submitted for the JD that although there were several issues put forth before the Court of Appeal as per the JD's written submission exhibited by the JC in Exhibit I of Enclosure 73, the Court had then confined and focused on only one issue ie, uncertainty of the Proof of Debt filed by the JC. There was no written judgment prepared in respect of the said issue and other issues as alleged by the JC. The only evidence before this Court was the general order which states that, *inter alia*, the appeal was allowed. Thus, it was unfair for this Court to presume that the issue before this court had been duly decided by the Court of Appeal. Furthermore, the existence of the Supreme Court Assessment Order was not in place before the said Court.

[15] We have read the appeal record and the able submissions of learned counsel. After giving much consideration to the submission of learned counsel, we take the view that the appeal has no merits. Our reasons *inter alia* are as follows:

(i) In the instant case, the appellant was not able to show that the learned High Court Judge had exercised her discretion on wrong principles or has failed to take into consideration relevant matters before her or has taken into consideration, consideration not before her. (See *East Asiatic Co. Ltd v. Malaysian International Merchant Bankers Bhd.* [1981] 1 LNS 71; [1981] 2 MLJ 30).

(ii) The AORO Order was rightly made on 17 January 2013 as at that material time there was no evidence of his solvency and/or ability to pay, etc.

(iii) When the Singapore Court of Appeal decision was delivered on 20 February 2013 that is after 33 days from AORO order that gave the JD a right to apply under s. 105 as there was sufficient evidence to show that he was solvent. The first application under s. 105 was not successful. However, in the second application, one of the main considerations was the admission by DGI not being able to assess damages since 17 January 2013. Thus, there was a change in circumstances. Taking a holistic view of the facts and the inability of the DGI to assess damages in Singapore, etc., we take the view that the learned High Court Judge has rightly exercised the discretion given in s. 105 of the BA 1967. Support for our view is found in a number of cases. For example, the Supreme Court in *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta Malaysia* [1995] 2 CLJ 368; [1995] 1 MLJ 274, had this to say:

A The powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion are, broadly speaking, the same. See *Re A Debtor (No 446 of 1918)* [1920] 1 KB 461 at p 465 applied in *Re A Debtor (No 12 of 1970), ex p Official Receiver v. The Debtor* [1971] 1 All ER 504. All the relevant facts and circumstances must be B considered. Where the court of first instance has exercised its discretion, a strong case would be required to authorise or induce the appellate court to interfere. See *Re Davidson* [1894] WN 210; *Re Carr* [1886] 35 WR 150 (refd); *Re A Debtor (No 994 of 1935), ex p The Debtor v. Official Receiver* [1936] 1 All ER 794.

C **[16]** We have also taken note of the respondent's argument that the bankruptcy notice which was served six years and four months without leave of the court was bad in law in reliance of the case of *V. Gopal, Re: Ex P; Bank Buruh (M) Bhd* [1987] 1 CLJ 602; [1987] CLJ (Rep) 602 where Justice VC George (as he then was) had held:

D [1] On the date that the bankruptcy notice was served on the debtor the creditor did not have a judgment on which execution could be proceeded with since to do so, by O. 46 r. 2(1)(a) leave of Court had first to be obtained and that therefore on that date the creditor did not have a final judgment within the meaning of s. 3(1)(i).

E [2] On the day that the bankruptcy notice was served, since 6 years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by O. 46 r. 2(1)(a).

[3] The relevant date is the date of the bankruptcy notice and not the date of the issue of the notice. The service of the bankruptcy notice followed F by the non-compliance of it results in an act of bankruptcy having been committed on which a petition may be founded. It is the filing of the petition that commences the bankruptcy proceedings.

[4] In the instant case, the petition is founded on what does not amount to an act of bankruptcy and accordingly the petition has to be and is G dismissed with costs.

[17] Learned counsel for the appellant objected to the issue being raised for the first time in the Court of Appeal as it was not raised before the Senior Assistant Registrar and/or the judge.

H **[18]** Since we have decided to affirm the High Court decision, we do not think it is necessary at this stage to deal with this issue. It is well settled that the bankruptcy proceedings are quasi criminal in nature and the strict provision of the law and/or rules must be complied with failing which the orders made in breach are bound to be set aside as of right and that can also I be done in collateral proceedings. (See *Badiaddin bin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393). In *Sobri bin Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756; [1991] 3 MLJ 32, Edgar Joseph Jr observed:

A

On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In re North ex-parte Hasluck* is the authority for the proposition that the statue relating to bankruptcy should be construed in a manner most favourable to the person affected.

B

[19] We take the view that the preliminary issue taken by the respondent is substantive in nature and a decision in favour of the respondent may result in dire consequences for the appellant. In consequence, it will only be proper for the respondent to make an application before the High Court, to give a fair opportunity to the appellant to argue at length.

C

[20] For reasons stated above, we dismiss the appeal with costs of RM15,000 to the respondent subject to allocatur. Deposit is to be refunded.

We hereby order so.

D

E

F

G

H

I